TNEU BEH

v.

TANJONG KELAPA SAWIT SDN. BHD. & 3 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J
[CIVIL SUIT NO. D3-22-28-92]
18 JULY 1994

TRUST: *Implied trust - Relationship of family members - Evidence of family fund - Family members not concerned with whom the properties were registered - Whether properties held on trust for the family.*

COMPANY LAW: *Non disclosure of interest by director of contract with company - All directors aware of interest - Purpose of passing resolution to sell - No general meeting approving transfer of shares.*

Since 1956, Tneu Beh, Bon Beng, Boon Seng Boon Eu and their father accumulated assets through the formation of family business and the income and profits derived from such business were channeled towards purchasing landed properties and shares. Tnue Beh claims that all the lands registered in his name and in the names of members of his immediate family are his as he had purchased them from out of his own fund, and those registered in the names of his younger brothers are also his, as his younger brothers held them in trust for him. Tneu Beh also claims that the shares in Tanjong and Lumayan were held by his younger brothers as his nominees, Bon Beng, Boon Seng and Bon Eu contend that all such lands and assets are held by them as trustees for the family, as the lands and shares were acquired from a family fund and it is right and equitable that the lands and shares be distributed equally between the four of them. They filed a counter claim.

Held:

[1] If indeed the 3 younger brothers were Tneu Beh's trustees, there is no reason why he should join Tanjong as a shareholder and director later. The fact that he did can only mean that Tanjong like the other businesses run by the family business and in 1978 when he became a shareholder, a director and chairman of Tanjong, he was already the Head of the family by virtue of his being the eldest son of the family and he had to assert his position by getting himself involved in a company which he had founded. For these reason the shares now held by Boon Beng, Boon Seng and Boon Eu in Tanjong are not held by them as trustees for Tneu Beh.

[2] Considering the relationship of the parties, the close family unit and that their lives are centered on the success of their family businesses and family life, there is ample evidence of the existence of a family fund and it was the family fund that financed the purchases of the numerous assets and properties.

[3] It is the collective contribution of the 4 brothers that have earned the family the wealth, the distribution of which is now disputed. They are no doubt partners insofar as the family businesses are concerned. They were not concerned with whom the properties were registered as there was no bickering amongst them until these proceedings commenced. Considering all the evidence in its entirety, an implied trust exists on the facts of this case and the registered owners of the various properties hold them in trust for the family.

[4] The implied trust overrides the provisions of clause 3 of the agreement and to that extent, the shares now registered in the named of Boon Beng, Boon Seng and Boon Eu are part and parcel of the family property.

[5] The evidence of Tneu Beh's claim that he procured shares from his friends by swapping them with properties belonging to him is very scanty and there are no particulars given as to what properties had been swapped by Tneu Beh in exchange for the Lumayan shares. In the light of such unsatisfactory evidence, in all probability the consideration for the purchase of the 49% of the Lumayan shares must have come from the family fund and to that extent, these shares must be accounted as part of the family property.

[6] The duty to disclose under s. 131 of the Act is to make all the directors aware of the interests which one or more directors may have in a contract entered into with the company. Under the circumstances of this case, s. 131 has not been contravened as all directors were aware of Boon Seng's interests when they executed D3, the resolution approving the sale.

[Order accordingly]

Legislation referred to:
Companies Act 1965, ss. 131, 132C(l)(b) & E

For the plaintiff - K. S. Narayanan (Y.K. Leong & Preeti Kaur with him); M/s. Riza Leong & Partners
For the 1st and 2nd defendants - Robert Lazar (Foo Yet Ngo with him); M/s. Shearn Delamore & Co.
For the 3rd and 4th defendants - D. P. Naban; M/s. Lee Hishammuddin

JUDGMENT

Siti Norma bte Yaakob J:

The dispute in these proceedings is very much a family dispute amongst four brothers as to the distribution of assets accumulated since 1956, including shares in two companies, Lumayan Plantation Sdn. Bhd. (Lumayan) and Tanjong Kelapa Sawit Sdn. Bhd. (Tanjong). In this respect, two separate actions have been filed, the first being D2-22-1547-91 and the second, D3-22-28-92, and although there is no order for consolidation, the parties have agreed to refer to the second suit as the proper parties in these proceedings. There is also a counterclaiin filed in the second suit.

To appreciate the true nature of this family dispute, I shall now go into the family history and trace the events that led to the filing of the two suits. To avoid any confusion as to the parties in the two suits, I shall refer to them by name.

Tneu Beh, PW1, is the eldest son of Tew Cheng Kang (the father), who died in 1967, and Goh Tian (the mother), who died in 1979. Tneu Beh's younger brothers are Tew Hon Liam @ Tiew Boon Beng (Boon Beng), DW4, Tew Tian Lam @ Tneu Boon Seng (Boon Seng), DW3, and Tiew Kun @ Tiew Boon Eu (Boon Eu), DW1.

In 1946, the father took the mother, Boon Beng, Boon Seng, Boon Eu and a daughter to China. Tneu Beh, who was then 12 years old, was left behind in Malaya with an uncle, Tiew Kok, the younger brother of the father.

In 1948, the father returned to Malaya with a nephew, Teck Lam, DW2, a son of his eldest brother, and they joined Tiew Kok in the business of trading and processing coffee and coconut in Tanjong Sepat, Ulu Langat. Tneu Beh worked for them.

In 1955, the mother returned from China together with Boon Beng, Boon Seng and Boon Eu. Boon Beng and Boon Seng stopped schooling and helped in the farnily business but Boon Eu, who was only 9 years old then, continued with his education and he was later sent to Taiwan where he qualified as a civil engineer.

Tneu Beh got married the same year to a woman of his parents' choice. It was following this marriage and in 1956 that the joint business of Tiew Kok, the father and Teck Lam was split up and this too saw the beginning of the father, Tneu Beh, Boon Beng and Boon Seng initially and later on Boon Eu, accumulating assets through the formation of family businesses and that the income and profits derived from such businesses were channelled towards purchasing landed properties and shares which now form the subject matter of the dispute amongst the 4 brothers.

Tneu Beh claims that all the lands registered in his name and in the names of members of his immediate family are his, as he had purchsed them from out of his own funds, and those registered in the names of his younger brothers are also his, as his younger brothers held them in turst for him. As regards the shares in Tanjong and Lumayan that are registered in the names of his brothers, Tneu Beh seeks a declaration that his younger brothers held the shares as his nominees and that the shares be transferred to him as the beneficial owner.

Boon Beng, Boon Seng and Boon Eu, on the other hand 'contend that although the lands and shares are registered in their names and in the names of Tneu Beh and members of Tneu Beh's immediate family, all of them without exception held 'such lands and assets as trustees for the family, as the lands and shares were acquired from a family fund and it is right and equitable that the lands and shares be distributed equally between the 4 of them. Additionally, Boon Eu also seeks a reimbursement of all monies that he had lent to the family.

For a clearer understanding of the issues at hand, I shall now deal with the happenings of the family, the roles that each member played in the accumulation of the assets and the claims made by each of them, by dividing them into:

(1) the period between 1956-1967, the year the father died. It was during this period that the properties listed in Schedule A to the counterclaim were acquired and, except for one property known as the Batu land, all the properties are registered in Tneu Beh's name.

(2) the period between 1968-1979, the year the mother died. During this period, all the properties listed in Schedule B to the counterclaim were acquired, and they are registered generally amongst 'Neu Beh, Boon Beng and Boon Seng.

(3) the period between 1980-1991, the year when the first suit was filed. Schedule C to the counterclaim lists the properties acquired during this period and they are registered either in Tneu Beh's name or in the names of those of his immediate family. As such, none of his younger brothers feature in any property in Schedule C.

Period between 1956-1967.

It is not disputed that following the split of the joint business in 1956, the assets of the business, namely land, were divided between the persons who controlled the business. It is Tneu Beh's evidence that since he and his uncle were active in the joint business, the lands were divided between them. He got 10 acres but the father received nothing, as the latter was plagued with ill health and did not put much effort into the business.

Teck Lam, DW2, who is Tneu Beh's cousin and the only surviving relative who joined Tiew Kok and the father in the joint business after he came to Malaya in 1948, testified that following the split, 25 acres of land were divided between the 3 of them. He got 2 1/2 acres, the father 10 acres and Tiew Kok 12 1/1 acres. Tneu Beh got nothing. Teck Lam also testified that the father was active in the business, he enjoyed the best of health and only became sickly two years before his death. It is also his testimony that after the split, the father

managed and controlled all the finances of his family businesses, assisted by his sons, Tneu Beh, Boon Beng and Boon Seng.

I have no reason to doubt Teck Lam's evidence, as he has nothing to gain from these proceedings. His evidence that Tneu Beh got no property following the split, stands to reason as what we are dealing with here is a typical Chinese family who still regard the father as the Head of the family. In this instance, Tneu Beh conceded that it was pursuant to his father's and uncle's wishes that the joint business was split up in 1956 and the proportion of the lands given to Tiew Kok, the father and Teck Lam is, I consider, an indication as to the role each played in the trading of coffee and coconut. Tiew Kok got the biggest share, no doubt as he had been long in the business. There is evidence that he was already actively trading in coffee and coconut when his elder brother, the father, left for China in 1946 and that he controlled the finances of the joint business. That fact that Teck Lam got less than the father suggests that the latter took a more bigger and active role in the business than Teck Lam. Weighing the evidence in its totality, I have my doubts as to Tneu Beh's claim that he, and not his father, was given a share of the business following the split.

I now come to the formation of Chop Eng Kwang, which Tneu Beh claims was formed and managed by him following the split and dissolved by him in 1984. From the evidence it is clear that this sole proprietorship firm which was engaged in the trading of coffee, coconut, vegetables and fruits, was the flagship that started the family's business. Although it started doing business in 1956, it was only registered on 20 May 1960, and Tneu Beh was the registered sole proprietor. This in itself does not entitle him to regard the business as his personal business as:

(1) the father was still alive and being the Head of the family, must be in control.

(2) Boon Beng and Boon Seng assisted him in the business, and although their contributions may not be at the managerial level, nonetheless their participation cannot be brushed aside as being irrelevant, particularly when they were not paid salaries but instead their living expenses came from the business.

(3) there is documentary evidence at AC28-30 to show that on 1 August 1972, Boon Seng took over the sole proprietorship from Tneu Beh.

I now come to the business of Sin Ho Seng which dealt in rubber. It is Tneu Beh's testimony that for a consideration of RM5,000, which was his own money, he became a partner of the business in 1963 together with one Ng Soon Bee. When the latter retired in 1964, Tneu Beh managed the business as a sole proprietor until 1977, when the company became a limited company with him holding 40% of its shares, Boon Seng 40% and one Lim Kwee Chan the remaining 20%.

Boon Seng, however, testified that the RM5,000 capital for Sin Ho Seng was supplied by the father who left the management of the business to Tneu Beh, assisted by him, Boon Seng and Boon Beng.

On balance, I accept Boon Seng's evidence as being more realistic as, firstly, apart from Tneu Beh's oral assertion, there is no concrete evidence that if indeed he contributed to the capital of Sin Ho Seng, he has not proved that the money was his own.

From the very beginning, the father and members of his immediate family lived together with Teck Lam. In 1963, they moved to a 4-unit shophouse situated at No. 376, Main Road, Tanjong Sepat, and until 1990, the families of Tneu Beh, Boon Beng, Boon Seng and Boon Eu lived as one family unit, cooking and eating from the same pots.

Tneu Beh now claims that the 4-unit shophouse belongs to him, as he had bought the land on which the shophouse stands with his own funds, they being the profits from Chop Eng Kwang and, furthermore, the shophouse was registered in his name. Apart from his bare assertion, Tneu Beh has not given particulars as to the purchase price of the land, the person from whom he had bought the land or when the purchase was made.

On the other hand, Boon Eu has testified that the 4-unit shophouse was constructed on land which was tendered for by the father using Tiew Kok's name. Subsequently, the father constructed a shophouse with 4 entrances on the land and transferred the title of the land to Tneu Beh.

The fact that the shophouse has 4 entrances bears out the father's concern that there should be a family home where all his 4 sons and their families should live under one roof. This intention was fulfilled in 1963, when the families of his 4 sons moved into the shophouse and lived as one family to this very day. To that extent, I cannot accept Tneu Beh's evidence as establishing the true picture as regards the purchase of the land on which the 4-unit shophouse now stands.

1974 also saw the formation of another business concern under the style and name of Sin Ho Seng Kelapa Sawit and from its very name, it dealt in palm oil. It was a partnership firm and the partners were Tneu Beh, Boon Beng and two others. This partnership was dissolved in 1975 when it was converted into a company known as Tanjong Kelapa Sawit Sdn. Bhd. (Tanjong), and the assets of the partnership went to Tanjong.

The capital of Tanjong was then RM5, divided into 5 shares of RM1 each, and the original shareholders were:

(1) Bon Beng

(2) Boon Seng

(3) Boon Eu

(4) Tiew Eng

(5) Lim Hai Cheng

Boon Beng, Boon Seng ancl Boon Eu were also the original directors of Tanjong but Tneu Beh was neither a shareholder nor a director then but this position is to change, particulars of which I shall deal with later.

Period between 1968-1979.

Following the father's death, Tneu Beh obtained letters of administration in respect of the father's estate and the only property left by the father was House Lot B, which was later transferred into Tneu Beh's name. Teu Beh is the petitioner in the petition for letters of administration, but he identified only 3 beneficiaries, i.e. the mother, himself and Boon Seng. Boon Beng and Boon Eu are excluded as beneficiaries and the reason given by Tneu Beh is that he had excluded them on the instructions of the mother, as they, Boon Beng and Boon Eu, did not speak Bahasa Malaysia. Realising now that Boon Beng, Boon Seng and Boon Eu are equally entitled to a share of the father's estate, Tneu Beh is now agreeable to have the property shared equally with his 3 younger brothers.

During this period, the various businesses grew and expanded and the responsibilities of Tneu Beh, Boon Beng and Boon Seng followed a distinct pattern in that Tneu Beh took charge of the finance and businesses and made all major decisions on the investments to be

made. Boon Beng took charge of the workers and Boon Seng was in charge of accounts and book-keeping.

Period from 1980-1991.

It was during this period that Boon Eu, who has since qualified as a civil engineer, began to take some interest in the businesses run by his 3 elder brothers. Before this, he took no interest as he was financially independent then. As a professional, he had worked in an engineering firm in Singapore and after that, he was involved in housing projects which earned him large profits.

However, when Tneu Beh took a second wife in Thailand and started a business known as Bangbon Oil & Fats Co. Ltd. in Bangkok in 1980 and spent more time in Thailand than in Malaysia, Boon Eu got involved with the family business and he was responsible for seeing to the welfare of Tneu Beh's immediate family in Malaysia as well as Boon Beng's and Boon Seng's families. As the family's businesses were not doing very well then, he advanced his own funds to meet the educational expenses of his neices and nephews at home and abroad, the maintenance of the 3 families of his elder brothers as well as to Tanjong when Tanjong ran short of funds. He maintained a record of such advances in AMl-106 which, he testified, was prepared in 1986 on the instructions of Tneu Beh.

It is Boon Eu's testimony that in 1986, all 4 brothers had met to discuss the distribution of all the family assets and it was then agreed that after paying off all advances made by him towards the family and the family businesses, the balance would be divided in the ratio of ½ to Tneu Beh and ¼ each to Boon Beng and Boon Seng. It was to establish the amount due to Boon Eu that Tneu Beh had instructed Boon Eu to prepare AMl-106 and he had showed AMl-106 to Tneu Beh. In any event, no agreement on distribution was reached in 1986 as Boon Beng and Boon Seng wanted the balance of the assets, after credit is given to the advances made by Boon Eu, to be divided equally between them and Tneu Beh. Boon Eu's testimony on the 1986 discussions and the reason for the submission of AMl-106 were confirmed by Boon Beng and Boon Seng.

Tneu Beh was cross-examined on the family discussions in 1986 but he denied there were such discussions held and neither did he instruct Boon Eu to prepare AMl-106.

In this instance, Tneu Beh's testimony seems to contradict his later actions in 1991, when he suggested 5 outsiders to mediate on the issue of distributing the family assets between him and his 3 younger brothers but the mediatros could not reach agreement. The very fact that there had been an intervention by outsiders lends support to the belief that there must have been earlier discussions on distribution which proved unsuccessful. In all probability, one such discussion must be the 1986 discussion and it stands to reason thatAM 1- 106 was prepared then by Boon Eu to establish the family's indebtedness to him so that a true picture of the family's assets can then be ascertained for purposes of calculating and distributing the shares of his elder brothers.

I now come to the ownership of the disputed shares, these being:

(1) the shares in Tanjong and Lumayan, and

(2) the 210,000 shares held by Tanjong in Lumayan.

As I had indicated earlier,Tanjong had an initial capital of RM5 and the shareholders of Tanjong in 1975 were Boon Beng, Boon Seng, Boon Eu, Tiew Eng and Lim Hai Cheng and they held 1 share each. Boon Beng, Boon Seng and Boon Eu were also the directors of Tanjong but Tneu Beh was neither a shareholder nor a director.

In 1978, Lim Hai Cheng transferred his one share to Tneu Beh pursuant to an agreement dated 1 September 1978 (AG106), and following the transfer Tneu Beh became a director as well as the chairman of Tanjong.

In 1980, the capital of Tanjong was increased from RM5 to RM140,006 with an allotment of 140,000 shares of RM1 each, and the shares were distributed in the proportion of 20% to Tiew Eng and 30% each to Tneu Beh, Boon Beng, Boon Seng and Boon Eu.

On I May 1981, Tiew Eng transferred his 20,001 shares to Tneu Beh in exchange for a piece of land and Tneu Beh became a substantial shareholder with a holding of 50,002 shares in Tanjong.

On 12 August 1981, there was a second capitalisation and this time Boon Beng, Boon Seng and Boon Eu were allotted 31,999 shares each, whilst Tneu Beh received 63,998, twice the number of shares that his 3 younger brothers got, thereby enhancing his holdings to 114,000 shares, which represents 38% of the paid up capital of Tanjong, whilst his 3 younger brothers held 62,000 shares each and their total holdings represent 61.8% of Tanjong's paid up capital. It was in the exercise of their majority shareholdings that Boon Beng, Boon Seng and Boon Eu removed Tneu Beh as the chairman and director of Tanjong at the extraordinary general meeting held on 7 March 1991.

It is Tneu Beh's contention that he provided Tanjong's initial capital but had all the shares registered in the names of his younger brothers and two others as he wanted to avoid paying income tax. However, he conceded that in the two capitalisation exercises, no money was paid by any shareholder in the allotment of the shares. Nonetheless, he claims that the shares held by Boon Beng, Boon Seng and Boon Eu in Tanjong are held by them on trust for him and as the beneficial owner, he is entitled to have their shares transferred to him.

Boon Beng, Boon Seng and Boon Eu dispute this allegation and maintain that their shares were purchased from a family fund.

It must be remembered that Tanjong originated from Sin So Seng Kelapa Sawit, a partnership firm that carried on business for only one year, after which it was dissolved and its business and assets were taken over by Tanjong, a private limited company that was incorporated on 20 August 1975. This is not disputed and there is, therefore, more reason to believe that Tanjong's capital came from Sin Ho Seng Kelapa Sawit and not from Tneu Beh, especially when he had failed to show how he had paid for his brothers' shares. Sin Ho Seng Kelapa Sawit was very much a family business and two of its partners were Tneu Beh and Boon Seng.

Tneu Beh also claims that although he founded Tanjong, he was never one of the original shareholders or directors until 1978 and this is because he wanted to avoid paying income tax. This reasoning presupposes that his tax liability in 1975 must be pretty high but there is no evidence that he in fact paid income tax much less produce any evidence to establish the extent of his tax liability.

The fact that he became a shareholder and chairman of Tanjong in 1978 and that his shareholdings increased substantially following 2 capitalisation exercises, do not support the reason why he had excluded himself initially from participating in the business of Tanjong. If indeed the 3 younger brothers were his trustees as Tneu Beh would like this Court to believe, there is no reason why he should join Tanjong as a shareholder and director later. The fact that he did can only mean that Tanjong, like the other businesses run by the family, is no more different in that it is also another family business and in 1978 when he became

a shareholder, a director and chairman of Tanjong, he was already the head of the family by virtue of his being the eldest son of the family and he had to assert his position by getting himself involved in a company which he had founded. For these reasons, I do not consider that the shares now held by Boon Beng, Boon Seng and Boon Eu in Tanjong are held by them as trustees for Tneu Beh.

As Tanjong's capital came from Sin Ho Seng Kelapa Sawit, where did the funds originate to establish that partnership firm and, for that matter, the other family businesses? In this respect, there is evidence to show that there was an iron safe which Tneu Beh admitted was purchased by him and kept in his parents'room. Although Tneu Beh was not asked why he purchased the iron safe, there is evidence from his 3 younger brothers that cash profits earned from the family businesses were pooled into the iron safe and it was the money from the iron safe that financed the purchases of the family's investments. While it is true that there is no direct evidence as to the amount of money that was kept in the iron safe, and the amount taken out, the practice of maintaining such a safe for such a purpose is not altogether strange, given the situation that what we are dealing with here is a typical Chinese family, steeped in the tradition that they work and live together and during the lifetime of the father, the son looked to him as the head of the family and after his death, the mother took his place and after her death, the honour fell on the shoulders of the eldest son, Tneu Beh. Considering the relationship of the parties, the close family unit and that their lives are centred on the success of their family businesses and family life I consider that there is ample evidence of the existence of a family fund and that it was this family fund that financed the purchases of the numerous assets and properties, the ownership which is now being disputed.

Connected to the existence of the family fund is the issue of whether there is in existence an implied trust that all the properties were acquired for and on behalf of the family and that the registered owners hold them on trust for members of the family. Whether such an implied trust exists must depend on the facts of each case.

In this case, the parties are related to each other. They are either brothers, uncles or nephews. Tneu Beh, Boon Beng and Boon Seng have done nothing else throughout their lives other than being involved in the family's businesses. Initially, the family was involved in coffee and coconut and they were involved in the business of the two commodities. Later, when the business expanded to rubber and oil palm, they too were involved.

It is true that their areas of involvement and contributions differ in that Tneu Beh being the eldest son, was the born leader. After his father's death, he decided what companies to form and what investments to make. With the little education that they had, Boon Beng and Boon Seng started off doing the menial and heavy tasks but over the years, Boon Beng was given the responsibility to look after the workers whilst Boon Seng kept the books and accounts in order. Be that as it may, both of them committed themselves wholeheartedly to the family's businesses, in return, they were not paid fixed salaries but were maintained by the family.

As the youngest son, Boon Eu was luckier than his elder brothers in that the family could well afford him a good education and he qualified as an engineer in Taiwan and with his professional qualification, he was able to secure his own financial independence away from the family. Nonetheless he made his contribution to the family during the period Tneu Beh spent more time in Thailand than in Malaysia. It was also the period when the family was experiencing cash flow problems. Boon Eu, who had funds of his own, helped out by advancing his own money to the family businesses and the upkeep of the family members. This was the beginning of his involvement in the family business as he managed the family business and provided guidance.

It is this collective contributions of the 4 brothers that have earned the family the wealth, the distribution of which is now disputed. They are no doubt partners insofar as the family businesses are concerned. They were not concerned with whom the properties were registered as there was no bickering amongst them until these proceedings commenced.

Considering all the evidence in its entirety, it is my considered opinion that an implied trust exists on the facts of this case and that the registered owners of the various properties hold them in trust for the family.

Besides Tanjong, there is another company, Lumayan, which was incorporated on 14 December 1970. The shares in Lumayan were acquired through a sale and purchase agreement dated 29 January 1978, AD62-77. Tneu Beh purchased 350,000 shares from 6 different shareholders of Lumayan for a consideration of RM906,400. It is Tneu Beh's testimony that he provided 49% of the purchase price whilst 10 friends provided the remaining 51%. Whilst maintaining he paid for the purchase price of 49% of the shares, none of the shares was registered in his name. Instead, he registered them in the names of his 3 younger brothers and Tanjong.

On 29 June 1981, one Gan Yong Chai, one of the 10 who provided part of the purchase price for the 350,000 Lurnayan shares in 1978, sold his 16,000 shares in Lumayan to Boon Seng, pursuant to the sale and purchase agreement at AD82-83. It is Tneu Beh's testimony that he paid for the purchase price of RM42,500 on behalf of Boon Seng. With this transfer, Boon Beng, Boon Seng, Boon Eu and Tanjong held 51% of the shares in Lumayan whilst the remaining 49% was held by the 9 outsiders. In 1982, the 49% was transferred to Tneu Beh and his 3 sons and they hold those shares to this day.

Tneu Beh now contends that the 40,000 Lumayan shares registered in Boon Beng's name, the 56,000 shares registered in Boon Seng's name and the 52,000 registered in Boon Eu's name are held by them as nominees, pursuant to clause 3 of the sale and purchase agreement at AD63 and as the beneficial owner, Tneu Beh now demands the transfer of those shares into his name.

Boon Beng's, Boon Seng's and Boon Eu's reply is that those shares are also caught by the implied trust, as the shares were purchased from the family fund and that the shares are the family's common property.

I have already dealt with the issue of the implied trust and in the absence of clause 3 of the sale and purchase agreement, I would readily have concluded that the Lumayan shares registered in the names of Boon Beng, Boon Seng and Boon Eu are also covered by the implied trust. However, faced with clause 3, the question is whether the express arrangements in clause 3 place the Lumayan shares of the 3 younger brothers outside the ambit of the implied trust.

To begin with, the sale and purchase agreement containing the arrangements in clause 3 is made between Tneu Beh and the various sellers of the 350,000 Lumayan shares. Boon Beng, Boon Seng and Boon Eu are not parties to the agreement and neither were they aware of the agreement until it was disclosed in these proceedings. Had the 3 younger brothers been privy to the agreement, I would readily conclude that their shares are caught by clause 3 but as this is not the case, I consider that the implied trust overrides the provisions of clause 3 and to that extent, the shares now registered in the names of Boon Beng, Boon Seng and Boon Eu are part and parcel of the family property.

Now, what about the Lumayan shares that are in Tneu Beh's name and those registered in the names of members of his immediate family? Tneu Beh claims that he procured those shares from his friends by swapping them with properties belonging to him. Evidence of this swap is very scanty and there are no particulars given as to what properties had been swapped by Tneu Beh in exchange for the Lumayan shares. In the light of such unsatisfactory evidence, I consider that in all probability the consideration for the purchase of the 49% of the Lumayan shares must have come from the family fund and to that extent, those shares must be accounted as part of the family property.

Tanjong also holds shares in Lumayan and initially the number was 105,000 shares but following a capitalisation exercise, Tanjong's holding rose to 210,000 in 1978. However, on 28 September 1984, the 4 brothers, in their capacities as directors of Tanjong, passed a resolution approving the sale of the 210,000 shares held by Tanjong in Lumayan at the book value of RM1.50. It was also resolved that Boon Eu was authorised to execute all necessary documents relating to the transfer on behalf of Tanjong. The resolution is D3. Although the resolution did not name the purchaser of the shares, an agreement was entered into on 24 September 1985, D4, between Tanjong and Boon Seng, whereby Bon Seng agreed to purchase the 210,00 shares for a consideration of RM315,000.

However, the sale was only completed in August 1991, (see AF92), when Boon Seng tendered a cheque for RM58,815.45, after credit was given for the debt due from Tanjong to Boon Seng. Tanjong's liability to Boon Seng amounted to RM256,184.55 as at 31 December 1990, (see AF90), and it is the difference between the purchase price of the 210,000 shares under D4 and the debt due to Boon Seng which accounted for the balance of the purchase price that was tendered by Boon Seng to Tanjong in August 1991.

At the same time, Lumayan passed a resolution approving the transfer of the 210,0000 shares from Boon Seng to Boon Eu and Tneu Beh now makes a claim for those shares on the grounds that it was improperly transferred to Boon Eu and that the shares should revert to Tanjong and ultimately to Tneu Beh as the beneficial owner by virtue of clause 3 of the agreement of sale date 29 January 1978, at AD63.

It is Tneu Beh's contention that the transfer of the shares is defective as s. 131 of the Companies Act 1965 (the Act) has been contravened. This section deals with the disclosure by a director of any interests the director has in any contract with the company.

The allegation here is that Boon Seng signed D3 as a director of Tanjong and assuming that the resolution was meant for him, he should have disclosed his interest at a board meeting of Tanjong. This was not done and, as such, he had committed an offence under s. 131 of the Act.

D3 does not identify the purchaser of the shares and in all probability, the 4 brothers had not considered that one of them would be the purchaser of the shares. In any event, D3 was signed by all the 4 directors of Tanjong and assuming that D3 was intended for Boon Seng, all 4 directors would then have been aware of Boon Seng's interest.

The duty to disclose under s. 131 of the Act is to make all the directors aware of the interests which one or more directors may have in a contract entered into with the company. Under the circumstances of this case, I do not consider that s. 131 has been contravened as all the directors were aware of Boon Seng's interest when they executed D3.

The purpose of passing D3 is also relevant to determine whether there has been non-disclosure on the part of Boon Seng.

Tneu Beh contends that D3 was passed to satisfy the banks of Tanjong's credit worthiness for the purpose of obtaining credit facilities. As the shares were Tanjong's main assets, I very much doubt whether the banks would be very happy to see Tanjong's assets being sold off. To that extent, I consider the reason given by Tneu Beh to be unrealistic and unconvincing.

On the other hand, the defendants state that the sale of the shares was to pay off Tanjong's debt to Chop Eng Kwang and since at that material time, Boon Seng was the sole proprietor of Chop Eng Kwang the purchase was made by him. This is confirmed when the balance of the purchase price was paid for by Boon Seng in August 1991 after giving due credit for the amount due from Tanjong as at 31 December 1990. I accept the defendants' evidence on this.

It is also the contention of Tneu Beh that since the shares represent Tanjong's main assets, the transfer of the shares to Boon Seng should be approved at a general meeting and since there was no general meeting held by Tanjong, Boon Seng had committed an offence under s. 132C(l)(b) and E of the Act.

My short answer to this is that both sections are not applicable, as they were only enforced after D3 and D4 were entered into. On the facts of this case, since Tneu Beh had expressed agreement to dispose off the shares, they were validly transferred even though Tneu Beh was removed as a director and chairman of Tanjong on 7 March 1991.

Tanjong and Boon Eu have also questioned Tneu Beh's right to challenge the legality of the transfer of the 210,000 shares, for they contend that if anybody who should complain about the transfer, it should be Tanjong, the aggrieved party, and not Tneu Beh, as he is only a shareholder. It would appear that, as a shareholder, Tneu Beh has no cause of action as regards the transfer, but considering my finding on there being an implied trust in this case and the effect of clause 3 of the sale and purchase agreement at AD63, I do not consider that the lack of capacity on the part of Tneu Beh matters any more, as the 210,000 shares now formed part and parcel of the family property.

Finally, I come to AMl-8 which was prepared by Boon Eu and which represents the amounts of his own money tha the had advanced to the family and family businesses when the family was experiencing cash flow problems. Boon Eu made a claim for the sum of RM912,870.45, being the difference between the amount he had expended and the amount that he had taken from the family fund.

It is true that the amounts advanced by Boon Eu are not reflected in any account books but considering the particulars that are disclosed in AM1-8 and supported by the documents in AM9-106, I consider that on the peculiar facts of this case, it is not unreasonable to conclude that Boon Eu did make such advances and to that extent, he is entitled to be reimbursed for such advances.

Based on what I have concluded, I make the following orders:

(1) That Tneu Beh's claim is dismissed with costs.

(2) That the defendants'counterclaim be allowed with costs and that all the properties listed in Schedules A, B & C in the counterclaim be distributed equally between Tneu Beh, Boon Beng, Boon Seng and Boon Eu. These properties shall include:

(i) House Lot B that has been registered in Tneu Beh's name as the sole beneficiary of the father's estate.

(ii) Other properties, or their value, that had been sold by any of the 3 younger brothers.

(iii) All the Tanjong and Lumayan shares, including those registered in the names Tneu Beh and members of his immediate family.

(iv) The 210,000 Lumayan shares registered in Tanjong's name.

(3) That RM912,870.45 be paid out of the family property to Boon Eu before the distribution is effected as in paragraph (2) above.